No. 76-1535

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1977

CURVIN J. TRONE, JR., TRUSTEE FOR WESTGATE-CALIFORNIA CORPORATION, ETC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners brought this action in the United States Court of Claims, seeking compensation under the Tucker Act, 28 U.S.C. 1491, for what they claim was a taking by the Comptroller of the Currency of certain assets of Westgate-California Corporation and its subsidiaries (also known as the "Westgate Corporations") (Pet. 5). The alleged taking resulted from efforts by the Comptroller to require United States National Bank ("the Bank") to comply with applicable banking statutes by collecting or securing its excessive and illegal loans to the Westgate Corporations and others (Pet. 3-4).

In 1972 and 1973, during the course of regular examinations of the Bank, employees of the Comptroller found that the Bank had made numerous loans of questionable

credit-worthiness to Westgate-California Corporation and related companies amounting to more than 400% of the capital of the Bank (P. paras. 20-28),[1] far in excess of the amount allowed under 12 U.S.C. 84 and 371c. Moreover, C. Arnholt Smith, who was the largest single stockholder of the Bank and controlled it, also owned the majority of the stock of and controlled the Westgate Corporations (P. paras. 14, 16). This made the Westgate companies probable affiliates of the Bank. See 12 U.S.C. 221a (b). All loans to affiliates must be secured (12 U.S.C. 371c), but few if any of the loans to the Westgate Corporations were secured.

The loans from the Bank to the Westgate Corporations so overextended the Bank that, in May 1973, the Comptroller was forced to issue a cease and desist order, consented to by the Bank and by Smith (P. para. 37). Under that order, Smith resigned from the Bank but agreed to indemnify the Bank for any losses it sustained as a result of any loans or other extensions of credit to himself, the Westgate Corporations, and certain others, and to use his best efforts to collect or secure those loans to the Westgate Corporations then outstanding. A special committee of the Bank was appointed to oversee these efforts (P. para. 39). The Bank also agreed to document properly all credit files and perfect its interest in collateral as required by law.

After several months, it became clear that the Bank could not be saved simply by calling or securing the Westgate loans. At that point, the Bank was declared insolvent,

[1] "P" refers to the First Amended Petition filed by petitioners in the Court of Claims, a copy of which has been lodged with the Clerk of this Court.

and the Federal Deposit Insurance Corporation was appointed as receiver; it sold the Bank's "clean" assets to another California bank and proceeded to liquidate the rest of the assets (P. paras. 56, 57). Once the Bank failed, the Westgate Corporations had no source of financing and had to seek reorganization under Chapter X of the Bankruptcy Act, 58 Stat. 883 as amended, 11 U.S.C. 501 *et seq.* (Pet. 3). Petitioners are trustees in bankruptcy of the Westgate Corporations.[2]

Petitioners filed suit in the Court of Claims, claiming that the Comptroller's actions in forcing the Bank to collect or secure some of the loans to the Westgate Corporations constituted a taking of the property of the corporations (Pet. 5). Petitioners conceded that all acts performed by the Comptroller were legal and proper under the banking laws of the United States (Pet. 5).

The Court of Claims dismissed petitioners' suit (Pet. App. 1a-5a). The court held that the actions of the Comptroller did not constitute a taking but "fell well within the conventional ambit of bank regulation", since "[t]he Government simply caused the plaintiff companies to do what they should have been required to do by a properly-run bank" (Pet. App. 3a-4a). The Comptroller had merely tried to have the Bank, which had put the Westgate Corporations in an "improper preferential position", correct that situation (Pet. App. 4a). Thus, the court noted that unlike the potential eminent domain takings of private property underlying the *Regional Rail Reorganization Act Cases*, 419 U.S. 102, on which petitioners

[2] As a result of his part in the Bank-Westgate dealings, Smith was convicted of various federal offenses in 1975.

primarily relied, this case involves only "governmental regulation correcting and redressing substandard and improper activities" (Pet. App. 5a).

Petitioners now claim that it was error for the Court of Claims to dismiss their petition without affording them an opportunity to present evidence showing that the Westgate Corporations are innocent of wrongdoing and cannot be charged with the "taint" of C. Arnholt Smith (Pet. 2, 8). Petitioners appear to believe (Pet. 6-8) that the court rejected their claims because the court charged them with Smith's wrongdoings.

Petitioners misread the Court of Claims' decision and misconstrue the applicable law. The decision of the Court of Claims did not turn on whether petitioners were innocent of wrong-doing. Rather, that decision is correctly grounded on a finding that the Comptroller's actions were not a taking requiring compensation to petitioners—whether those petitioners were innocent or not—but instead were "customary regulation by the banking authorities of a troubled bank in an attempt to put its affairs in correct order and to undo and untangle prior actions of the Bank which should not have been undertaken" (Pet. App. 3a).

The government in fact did not "take" any interest in petitioner's property for the public's use, but merely required the Bank to take certain action to comply with the law. Cf. *United States* v. *Central Eureka Mining Company*, 357 U.S. 155, 165-166. Further, the party suffering the alleged losses had a preexisting contractual duty to make most, if not all, of the payments, as part of various loan agreements; to the extent that obligations were already owed or were willingly incurred, no loss of property interest occurred on which a claim of taking could be based.

Finally, even if the Comptroller's actions with regard to the Bank and Smith were the direct cause of some diminution in value of petitioners' property that was not the result of preexisting legal obligations or of obligations willingly entered into, these actions were, as the court noted, taken pursuant to the Comptroller's regulatory powers. Petitioners' contention that the incidental impact on the affairs of the Westgate Corporations constituted a taking is clearly without merit.

As this Court has said, "[a] member of the class which is regulated may suffer economic losses not shared by others. His property may lose utility and depreciate in value as a consequence of regulation. But that has never been a barrier to the exercise of the police power" "'under which property rights may be cut down, and to that extent taken, without pay'." *Bowles* v. *Willingham*, 321 U.S. 503, 518. See also *United States* v. *Causby*, 328 U.S. 256; *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393.

Since the court's finding that there had been no taking was equally correct regardless of the innocence of the creditors or the minority stockholders of the claimant companies, it was not error for the Court of Claims to grant summary judgment and thereby preclude petitioners from attempting to prove that they are not responsible for the actions of C. Arnholt Smith.[3]

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[3]As the Court of Claims noted (Pet. App. 4a), petitioners may have a claim against Smith for any injuries he caused them by taking illegal actions in the Westgate Corporations' names.

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

AUGUST 1977.

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